IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 345

CHARLES ROWOLDT, *Petitioner,*

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, ST. PAUL, MINNESOTA

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 38-41) is reported at 228 F. 2d 109. The opinion of the District Court (R. 35-8) has not been reported.

JURISDICTION

The jurisdiction of the Court rests on 28 U. S. Code, Sec. 1254(1). The petition for a writ of certiorari was granted on March 26, 1956 (R. 42).

STATUTE INVOLVED

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, amended section 1 of the Immigration Act of 1918, to provide in part as follows:

> "That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of the following classes:
>
> * * * * *
>
> "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt . . ."

The aforesaid Section 22 amended section 4 of the Immigration Act of 1918 to provide in part:

> "(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of

aliens enumerated in section 1 (2) of this Act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.[1]

QUESTIONS PRESENTED

1. Whether the petitioner had been a member of the Communist Party as that term was defined by this Court in *Galvan* v. *Press*, 347 U. S. 522; or whether he had been only a nominal member and therefore not subject to deportation.

2. Whether, notwithstanding *Galvan*, the statute providing for deportation of aliens for past membership in the Communist Party is unconstitutional on its face or as applied to the facts in this case.

STATEMENT OF THE CASE

The petitioner is an alien, a native of Germany. He is 72 years of age. He was admitted to the United States for permanent residence in 1914, and has lived in this country ever since. He has been refused American citizenship (R. 9).

Petitioner was ordered deported under Section 22 of the Internal Security Act of 1950, *supra*, on a finding that he had been a member of the Communist Party for about six months in 1935 (R. 9-11, 12). The de-

[1] These provisions were repealed by Section 403(a)(16) of the Immigration and Nationality Act of June 27, 1952, 166 Stat. 163, 279. The 1952 Act recodified and reenacted these provisions without material change. See Section 241(a)(6)(c), 66 Stat. 204, 8 U.S.C. 1251(a)(6)(c).

cision of the Board of Immigration Appeals affirming the order of deportation was handed down on March 28, 1952 (R. 9), more than two years before this Court's decision in *Galvan* v. *Press*, 347 U. S. 522.

The finding of Party membership was based upon a voluntary statement which the petitioner made under oath to an officer of the Immigration Service on January 10, 1947 (R. 12, 20-33). The portions of that statement which bear upon the issues in this case are as follows: (R. 25-32):

> "Q. Have you ever been arrested or in jail for any crime or offense anywhere? A. No, except the time in 1935 I was arrested in deportation proceedings.
>
> Q. Are you a member of any organizations or societies of any kind at the present time? A. Yes, I belong to the A. F. L. Local No. 665, Miscellaneous Hotel & Restaurant Workers.
>
> Q. To what organizations have you belonged in the past? A. In the past, the Worker's Alliance, the Communist Party.
>
> Q. When did you join the Workers' Alliance? A. In the spring or summer of 1935, I joined both the Workers' Alliance and the Communist Party.
>
> Q. Where did you join these organizations? A. In Minneapolis.
>
> Q. Did you hold any office in either of these organizations? A. Not in the Communist Party but in the Workers' Alliance, I was on the Executive Board, and once in a while I was secretary for some local.
>
> Q. What—the purpose of your joining the Communist Party at that time? A. We had no books then, just paid dues, and somebody collected.
>
> Q. Did you carry a party dues book at that time? A. No, but in the Workers' Alliance we had dues books.

Q. Did you carry a Communist Party card at that time? A. I don't think we had cards at all.

Q. For how long were you a member of the Communist Party? A. From then on until I got arrested and that was at the end of 1935. When I was arrested, I finished the Communist Party membership, but I stayed in the Workers' Alliance.

Q. How long did you continue your membership in the Workers' Alliance? A. Probably a couple of years longer—then it dissolved itself.

Q. What—the purpose of your joining the Communist Party? A. The Purpose was probably, this—it seemed to me that it came hand in hand—the Communist Party and the fight for bread. It seemed to me like this—let's put it this way—that the Communist Party and the Workers' Alliance had one aim—to get something to eat for the people. I didn't know it was against the law for aliens to join the Communist Party and the Workers' Alliance. I found that out when Mr. Adams told me.

Q. What were your political beliefs at the time you joined the Communist Party? A. My political beliefs were always somewhat for the benefit of most of the people—always for the benefit to help most of the people.

Q. Apparently you were a member of the Communist Party for approximately one year. Is that correct? A. Yes, probably something like that.

Q. What is your present attitude towards Communism? How do you feel about that? A. I explained that a couple of years ago to those people over there (indicates Mr. C. A. Frederickson). I believe today, and this is my honest opinion. I believe today that Communism and Capitalism, as we call it, will come together in spite of all the world war threats, and even preparations—to solve their problems, thus a better world without a third world war. That is my opinion today

and that much hope I have in the statesmen of the world today. That is the best way I can put that. That is my honest belief.

Q. What is your belief and understanding of the principles of communism? A. If you read Marx or any of the writers of Lenin and Stalin, you will find this—that out of a world of struggle between two classes will emerge finally—first it will be a dictatorship, totalitarian, which, as time goes by, will wither and regulate the economics of the world for the benefit of all people, which were formerly rich or poor.

Q. Is it your opinion that before communism and a capitalistic form of government will be able to exist in the same world, that a dictatorship must necessarily evolve from a capitalistic form of government? A. I answered that before. I said that Hitler was such a dictatorship of capitalism, that is what he didn't want. Now Hitler is overthrown and the main obstacle of the progressive form of march in the world has been more secured, I don't think it is necessary that a capitalistic dictatorship has to come because progressive forces in the capitalistic countries of today will eventually be able to cooperate with the communistic forces, and settle in more or less a peaceful manner, the business of the world. That is my honest opinion. Men come and go, and the people always stay. The people finally, in the last analysis, want peace and security. They will find a representative who will take care of that.

Q. Let me ask you this. What is your opinion as to the form of government which today we have in the United States? A. As far as I have found in the world, the American system of government, as far as the capitalistic system is concerned and even the communistic, is still the best in the whole world, including the communistic system, because there is not a good one yet.

Q. Are you of the opinion that our form of gov-

ernment is perfect? A. No, of course not, but we have a Constitution which is almost perfect, and by that measurement, we can make it perfect.

Q. Do you think that the Constitution under which we reside in the United States should be changed in any way, other than by the vote of the people? A. No, the Constitution should not be changed by just a man or two. The people of the United States should have the say in that.

Q. Do you have any opinion as to whether or not this country is headed for a change in the form of government? A. I can't have no opinion on that. For the time being there is no such thing.

Q. Do you have an opinion as to whether or not a form of government should be changed in any way other than by the will of the people? A. A form of government should not be changed in any way except by the will of the great majority of the people. I think President Lincoln said that.

Q. If a minority people of a government desire a change in the form of their government, do you think it would be wise and advisable to resort to force? A. No, that would not be wise or advisable. No, a minority should not go against the majority by forcing violence.

Q. Do you think it would be the right of a majority of people residing under a government to overthrow the government by force? A. No, not by force either. They should be able to do it peacefully, not by force.

Q. Were you an active worker in the Communist Party? A. The only active work I did was running the bookstore for a while.

Q. Where did you run a bookstore? A. 241 Marquette, Minneapolis.

Q. What sort of bookstore was it? A. Oh, all kinds of literature—all kinds of writers in the whole world—Strachey, Marx, Lenin's writing and others. Socialism and all that stuff.

Q. Did you own the bookstore? A. No, I didn't get a penny there.

Q. What was the arrangement there? A. I was kind of a salesman in there, but the Communist Party ran it.

Q. You secured this employment through your membership in the Communist Party? A. Yes.

Q. Was this store an official outlet for communist literature? A. Yes.

Q. What is your opinion of a revolution, such as occurred in Russia when the Communists obtained power? A. What is my opinion of the Russian revolution—that is about it. As much as I know about it, the Russian revolution, in my opinion, is this. It seemed that at the end of the war of 1914, the Russian middle-class especially and the Russian soldiers were sick and tired of being doubled-crossed and betrayed by their generals and what not (they went in with the Germans). Russian soldiers spilled their blood running against the Germans without ammunition, and there was chaos in the country. I said middle-class—that they organized and succeeded in overthrowing that particular leadership which was headed by the Czar. But this is my opinion. This was under the leadership of Kerensky. Seemingly, Lenin and his followers which represented more the lower peasant and factory workers, were not satisfied with this set-up, and kept on working for another revolution which finally overthrew the whole upper class in the fall of 1918, and so divorced themselves for the first time in world's history, economically and politically, from the rest of the world. That is the way I see it. That is my opinion on that.

Q. Do you advocate change of government by force or violence? A. No, never did.

Q. Do you feel that the present government of the United States will ever be overthrown by force or violence? A. On account of our Constitution and the very intelligent American people, we don't have to do that.

Q. Do you have any opinion as to whether or not it will ever occur? A. It could because after all, nobody can see into the future, but I don't believe it could.

Q. At the present time, are you in sympathy with the principles of communism? A. Communism doesn't tell me anything. Communism nor capitalism don't tell me anything. I am a progressive, and I want to see a better world. If I don't see it in this life, because I believe in reincarnation, I hope to see it when I come back—where all people can get to the resources of this life—that means education and life as we should have it. I like some of the sayings of Jesus. He said that he wanted that all people should be helped. Principles of communism and capitalism doesn't mean anything to me. They have too many points—first, dictatorship, hit the other fellow down.

Q. Do you feel that communism is a better or poorer form of government than a democracy? A. The communist government, as we know it now, is not better than a capitalistic government as we know it. It is not better.

Q. Do you feel that communism can ever replace and be a better form of government than a democracy? A. That is a question to which it is hard to answer because we cannot see into the future. The only way that I could answer that is—the trend in the world today seems to be to some sort of change, like socialism or communism, and if that trend should continue to engulf the whole world, it would be up to the people to make whatever develops out of it—a real government for themselves, which would be better than what capitalism today gives them.

Q. Do you believe, without reservation, in the form of government we have in the United States today? A. Yes, I believe, without reservation, in the form of government we have in the United States today. It is good enough for me.

Q. Do you feel that your beliefs in government have changed during the past ten years, that is, since you terminated membership in the Communist Party? A. Yes, it has changed to that extent—that I began thinking for myself instead of following somebody else telling me things. I found that nothing can be broken over a knee, and that any government that exists today as a right to exist as it is—by the power of the majority of a nation's people. Nobody in the world can say there are no changes. We must always consider changes. They can be made when the people see that it is the right time for it, and at that time they will have their representatives which will take care of it. I am absolutely against sudden dictatorship and overthrow of government.

Q. Again referring to your joining the Communist Party in 1935, was this motivated by dissatisfaction in living under a democracy? A. No, not by that. Just a matter of having no jobs at that time. Everybody around me had the idea that we had to fight for something to eat and clothes and shelter. We were not thinking then—anyways the fellows around me, of overthrowing anything. We wanted something to eat and something to crawl into.

Q. You say 'fight for something to eat and crawl into'. What do you mean by that term? A. We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget. Even at the few communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days.

Q. What is your opinion as to whether communism was the cause or outgrowth of the Russian

revolution? A. Communism did not start the revolution. The middle-class started the revolution. Lenin got hold of it. Communism was the result of the revolution.

Q. Were you an organizer for the Communist Party? A. No.

Q. What is your personal belief as to the principles of communism? A. What is communism? That is a good question. My belief is a different thing than communism is. According to Marx and Lenin and as I have seen the Communists working, since I knew of them, they are aiming, more or less, with forever methods to set up an economic system to get the people out of a monopoly control on to their own economic feet. That is the way I see them working now."

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Minnesota challenging the validity of the deportation order (R. 1-3, 34-35). The District Court denied the petition for a writ, holding that the deportation order was supported by the evidence (R. 35-38). The Court of Appeals affirmed (R. 41).

SUMMARY OF ARGUMENT

I

A. *Galvan* v. *Press*, 347 U.S. 522, construed the statute requiring the deportation of aliens who had ever been members of the Communist Party as not applying to persons who had been only "nominal members." This term includes, but is not limited to, persons who joined the Party to "obtain the necessities of life," who had "no real knowledge" of its "platform and purposes," or who were not aware that they were "joining an organization known as the Com-

munist Party which operates as a distinct and active political organization." Since the government has the burden of proving deportability, its evidence must exclude these and other situations of nominal membership by showing that the alien had engaged in such activity as to take him out of the nominal class.

B. The petitioner was merely a nominal member since he belonged to the Party for only about six months and was not active in it. Furthermore, he falls within specific classes of members expressly described as nominal in *Galvan*, having joined the Party "to obtain the necessities of life;" having been unaware that the organization operated "as a distinct and active political organization," and having had "no real knowledge" of its "platform and purposes."

C. At a minimum the case should be returned to the Immigration and Naturalization Service to determine whether petitioner was a nominal member. The Service decided the case two years before *Galvan* and did not take into account that decision's limitation on deportable membership. The administrative decision, therefore, must be set aside for the failure to make a finding on proper premises, even if the evidence would have supported such a finding if it had been made.

II.

A. The Court should reconsider its holding in *Galvan* v. *Press* that the statute is constitutional. *Galvan* holds that the expulsion power is not limited by substantive due process. This rule is of great significance to the alien community and to our society as a whole. *Galvan* also recognized that on principle

the statute is of dubious validity. Nevertheless, it sustained the statute solely on the assumption that the issues had been settled by prior decisions. This was an abnegation of the judicial function, and one which was based on an erroneous premise.

B. *Galvan* misreads history. It relies on generalizations from earlier cases that the deportation power is unlimited and that deportation is not punishment, meantime ignoring generalizations to the contrary in other cases. The generalizations relied on by *Galvan* derive from decisions which dealt with non-comparable subjects, namely, exclusion legislation, expulsion legislation ancillary to exclusion, or legislation which reasonably defined in terms of culpable characteristics classes of aliens who were undesirable residents when ordered expelled. This appears from a review of preceding cases.

Harisiades v. *Shaughnessy*, 342 U.S. 580, was the first case in this Court to sustain expulsion for conduct after lawful admission, which was not culpable when it occurred, and which had happened many years before the enactment of the legislation. It was also the first case to hold valid legislation expelling aliens for organizational membership. *Galvan* goes beyond *Harisiades*, which itself was wrongly decided, since it involves all the questionable features of *Harisiades* and in addition sustains a statute expelling aliens for membership in a named organization.

III.

A. Once the statute is examined on the basis of constitutional principle, there can be no doubt that it violates the due process clause. *Galvan* virtually

recognized as much. The most striking of the statute's features which violate due process is that it is special legislation. This act is the first and so far the only statute which expels aliens for membership in a specifically named organization, rather than by a descriptive classification of persons or organizations. On principle, the situation is the same as if Congress had listed the names of the aliens to be deported.

The statute's condemnation by legislative fiat is fundamentally repugnant to due process, whose basic concepts are that guilt cannot be legislated and that individuals and organizations cannot be condemned without a hearing. The government defends the statute on the ground that it is a reasonable legislative judgment, based on evidence considered by Congress, that the Communist Party is a pernicious organization. Due process, however, prohibits condemnation by legislative fiat even if there is reason to believe that the victim is getting what he deserves. Due process requires not simply that condemnation be reasonable or deserved, but that it be made by a civilized and fair method.

B. The statute is invalid as an irrational deprivation of liberty. The sole justification of the expulsion power is that it enables the state to remove from its territory undesirable alien residents. The statute violates due process because it is so capricious an exercise of the expulsion power as to shock the conscience, and because it imposes a cruel sanction for reasons having no rational relation to the expulsion function.

The statute expels an alien solely because of organizational membership. This imputation of guilt by

association is an offensively irrational means of adjudging an alien an undesirable resident. The irrationality is magnified by the fact that the statute makes no accommodation for the nature of the alien's connection with the organization. He may have had no knowledge of the claimed evil nature of the organization; his activities in the organization may have been innocuous, commendable, or limited to the exercise of constitutional rights; his membership may have been for a brief period; it may have existed long before the expulsion and long before the legislation making it cause for expulsion and may have been as remote as 1919 when the Communist Party was formed; the alien may never have had Communist beliefs, or, if he did, may have long ago abandoned them.

The present case fully illustrates the cruel irrationality of the statute. There is no rational basis for a judgment that the petitioner is an undesirable resident because about twenty years ago, in a different political climate and before enactment of the deportation statute, he belonged to the Communist Party for six months, having joined it to struggle by peaceable means for bread and shelter for the unemployed. Nor is petitioner's case atypical. A survey of political expulsion cases documents the inhumanity and lack of legitimate purpose of the policy of expelling persons on the ground of past Communist Party membership.

The government's contention that Congress could reasonably believe that the Communist Party advocates doctrines of violence is beside the point. The government is deporting petitioner, not the Communist Party or insurrectionary doctrine. Moreover,

the government's contention is inaccurate. The statute applies to the Party in the future, as well as in the past, and Congress could not make a reasonable determination of the Party's future advocacy. Furthermore, the statute expels for membership in the Communist Party during World War II, when there could be no basis for a claim that the Party was advocating insurrectionary doctrine, and it also expels for membership in the Communist Political Association, which the government has conceded did not advocate violent overthrow.

Nor can the statute be justified by necessity. Other expulsion legislation suffices to remove aliens who actually are undesirable.

C. There is nothing special about the expulsion power which warrants a disregard of the due process defects of the statute. *Harisiades* held otherwise on two premises: (1) The alien has no "vested right" to retain his residence and (2) the policy toward aliens is interwoven with the conduct of foreign relations and the war power. Both premises are unsound. Due process prohibits an irrational and discriminatory deprivation of a privilege, as well as of a "vested right," as for example, in the case of the privilege of government employment. And as *Galvan* itself pointed out, substantive due process is a limitation upon all powers of Congress even the war power.

Any connection between the conduct of foreign relations and the expulsion of domiciled aliens is tenuous, since expulsion does not involve negotiations with foreign governments and those expelled are not defined in terms of nationality.

The view in *Harisiades* that expulsion is not limited by ordinary principles of substantive due process stems from the erroneous assumption that the alien is an unassimilated element who enjoys this country's hospitality without contributing anything in return, and to whom, therefore, there is owed no obligation of decent treatment in the withdrawal of the hospitality. The Founders, however, included aliens as well as citizens in the obligation of decent treatment expressed by the due process clause. They did so because they realized that America needs the immigrant and that he is not merely a recipient of a gratuity. The immigrants contribute to our economy and society, give their children to populate the land, and become sociologically a part of American society. Since the immigrant does contribute to and is a part of our society, he is entitled to due process, both substantive and procedural.

IV.

A. The statute here involved meets the definitions of both a bill of attainder and an *ex post facto* law as previously set out by this Court, if it inflicts punishment. *Galvan* and *Harisiades* both stated that "deportation is not punishment." It is, however, not appropriate to inquire in the abstract and conceptualistically whether expulsion is punishment. The appropriate question is whether the particular expulsion provision inflicts punishment, and the answer will vary upon the nature of the legislation. In the words of the Court, "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon the circumstances attending and the causes of the deprivation."

A deprivation of a privilege is punishment unless it is based on general standards which establish reasonable tests of fitness to enjoy the privilege. As applied to expulsion legislation, a deprivation of the residence privilege is not punishment only if it establishes general standards reasonably relevant to ridding the country of aliens whose continued residence is hurtful.

If, as assumed in *Galvan* and *Harisiades*, the test of punishment is the nature of the privilege removed, rather than the basis for its removal, then it is indeed anomalous to hold that so harsh a consequence as the loss of residence cannot be punishment.

B. Under the proper test, the statute is clearly punishment. It establishes no standards at all of alien undesirability, a process which would necessarily involve a statement of culpable characteristics. All the statute does is to expel members of a named organization. This is not an establishment of standards or qualifications. It is merely an identification of the persons to be expelled. Furthermore, the statutory cause for expulsion—mere membership no matter how remote or innocent—is not reasonably connected to the objective of removing aliens whose continued residence is injurious to our society.

V.

The statute violates the First Amendment because it is a reprisal for the exercise of protected rights of assembly and expression.

Harisiades upheld expulsion of aliens for past membership in organizations advocating the violent overthrow of the government. The holding was based

on the pernicious nature of the advocacy involved and on an asserted right of Congress to distinguish between the advocacy of peaceable change and the teaching of violence.

The statute here makes no such distinction. It expels aliens for being members of an organization which did not during their period of membership advocate illicit doctrine.

Harisiades itself sustained an unjustifiable interference with First Amendment rights, since it authorized deportation not for anything the alien himself did or said, but solely because of the guilty advocacy of the organization. Furthermore, it disregarded the clear and present danger test. The statute here is an even greater invasion of the First Amendment than the provision sustained in *Harisiades*, and it cannot be justified even under that decision.

ARGUMENT

I. PETITIONER WAS ONLY A NOMINAL MEMBER OF THE COMMUNIST PARTY AND HENCE IS NOT DEPORTABLE. AT A MINIMUM, THE CASE MUST BE RETURNED FOR ADMINISTRATIVE DETERMINATION OF THE NATURE OF THE MEMBERSHIP

A. Nominal Party Membership Is Not a Ground for Deportation

Galvan v. *Press*, 347 U. S. 522, construed the statute requiring the deportation of aliens who had ever been members of the Communist Party as not applying to persons who had been only "nominal members" (at 527). The Court found that the petitioner in that case had been shown to be more than a nominal member and hence was deportable (at 529).

In discussing the concept of nominal membership, *Galvan* pointed out that in 1951 Congress specifically declared that it did not intend the term "member" to cover aliens who "had joined a proscribed organization (1) when they were children, (2) by operation of law, or (3) to obtain the necessities of life" (at 527). The opinion added, however, that "Congress did not provide that the three types of situations it enumerated in the 1951 corrective statute should be the only instances where membership is so nominal as to keep an alien out of the deportable class" (at 527).

The opinion further noted (at 527) that Congress specifically approved the following language from *Colyer* v. *Skeffington*, 265 Fed. 17, 72:

> "Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge."

Galvan concluded on this subject (at 528):

> "It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."

Galvan establishes, therefore, that in order to support a deportation order the government must prove more than Party membership alone. Since it

has the burden of proving deportability,[2] it must prove that the membership was more than nominal by showing that the alien had engaged in such activity as a member as to take him out of the nominal class. The evidence must exclude such situations, as well as others embraced within the concept of nominal, as that the alien joined the Party when he was a child, by operation of law, or to obtain the necessities of life; or that he was accidentally, artificially, or unconsciously in appearance only a member of the Party, of whose platform and purposes he had no real knowledge; or that he was not aware that the Party operated as a distinct and active political organization.

B. Petitioner Was No More Than a Nominal Member

In *Galvan*, the petitioner had belonged to the Party for two years from 1944 to 1946 (at 523-4). He was an active and leading member, having "been active in the Spanish Speaking Club, and indeed, one of its officers" (at 529). Unlike the petitioner in this case, Galvan had refrained from applying for American citizenship out of fear that his Party membership might thereby become known to the authorities (at 528-9). On these facts the Court held that Galvan had been more than a nominal member and therefore was deportable.

The petitioner in this case, however, was merely a nominal member. He belonged to the Party for only about six months. He held no office and was not an active member. His sole activity was to run a book-

[2] The current immigration law expressly provides that, "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Sec. 242(b)(4), Immigration and Nationality Act, 8 U. S. C. sec. 1252(b)(4).

store for a short time, and this activity was that of a sales clerk, not as a Party member.

Furthermore, petitioner falls within two of the classes of members expressly described as non-deportable in *Galvan*. He was, in the first place, one who joined the Party "to obtain the necessities of life." As petitioner described his purpose in joining (R. 26):[3]

> ". . . it seemed to me that it came hand in hand—the Communist Party and the fight for bread. It seemed to me like this—let's put it this way—that the Communist Party and the Workers' Alliance had one aim—to get something to eat for the people."

He was not, he testified (R. 31), motivated by "dissatisfaction in living under a democracy." Instead, the situation was (R. 31):

> "Just a matter of having no jobs at that time. Everybody around me had the idea that we had to fight for something to eat and clothes and shelter. We were not thinking then—anyways the fellows around me, of overthrowing anything. We wanted something to eat and something to crawl into . . . We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget."

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[3] Since the sole evidence upon which the deportation order rests is the petitioner's voluntary statement, the government must take that statement with all its qualifications as made. There was not here, as in *Galvan*, the testimony of a witness against the alien, upon which findings contrary to the statement of the petitioner could rest.

It does not matter that there may have been other avenues open to petitioner "to obtain the necessities of life" during the depression, or that the one he chose involved participation of others seeking the same end. He joined to obtain food and shelter, and in fact met with some success.

Secondly, petitioner was not, in the words of *Galvan*, aware that the organization he joined operated "as a distinct and active political organization," and he had "no real knowledge" of its "platform and purposes." He stated that he joined the Party because he saw it as engaging in "the fight for bread;" that it "had one aim—to get something to eat for the people;" that at the few Communist meetings he attended: ". . . nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days." In joining an organization whose one aim was, he thought, to fight for bread, petitioner was not thereby committing himself to a political platform as commonly understood. He gave no thought to the organization as a distinct political organization. Persons could join such an organization and retain their adherence to the Republican, Democratic, or other political parties.

C. At a Minimum the Case Must be Returned for Administrative Reconsideration

At a minimum the case should be returned to the Immigration and Naturalization Service to determine whether petitioner is a nominal member within the meaning of *Galvan* v. *Press*.

The decision of the Hearing Officer was handed down on May 15, 1951 (R. 16-19), and the affirming

decision by the Board of Immigration Appeals on March 28, 1952 (R. 9-11). The latter action thus preceded by more than two years the decision in *Galvan*. Both the Hearing Officer and the Board of Immigration Appeals found merely that the petitioner had been a "member" of the Communist Party (R. 11, 19). Neither considered the question of whether that membership was merely nominal, and the finding, therefore, was not coextensive with the meaning of membership established in *Galvan*. Since a finding of membership properly defined is essential to support a deportation order, the order must be reversed for the failure to make a finding on proper premises, even if the evidence could have supported such a finding. *Mahler* v. *Eby*, 264 U. S. 32.

The government itself recognized the necessity to reconsider a deportation order made before *Galvan* in the light of *Galvan's* qualifications of the term "member." After this Court had granted certiorari in *Garcia* v. *Landon*, 347 U. S. 1011, the government filed a suggestion of mootness, in which it stated that in view of the language in *Galvan*, it had set aside the deportation order so as to permit an administrative determination of whether Garcia was only a "nominal member." On the basis of this suggestion, the Court dismissed the writ as moot. 348 U. S. 666.

Since the Service here has failed to consider the correct legal standard of nominal membership, its order must be set aside. For if an administrative order is based by an agency on an unsound legal premise, it cannot be sustained even if it might have rested on valid premises. In such a case, the order must be remanded for administrative redetermination.

N.L.R.B. v. *Virginia Electric and Power Co.*, 314 U. S. 469; *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80; *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20.

II. THE COURT SHOULD RECONSIDER GALVAN v. PRESS

A. Galvan Represents an Abnegation of the Judicial Function

Although *Galvan* v. *Press* was decided as recently as May, 1954, there are compelling reasons for the Court to reconsider its holding that the statute here involved is constitutional. These exist over and above the inconclusive role of stare decisis in cases involving major constitutional questions,[4] particularly those affecting personal liberty.

Galvan established (1) that the due process clause does not limit Congress' power to declare which aliens shall be expelled, and (2) that the ex post facto clause (and on a like basis the bill of attainder clause) does not apply to expulsion legislation because deportation is not punitive. According to *Galvan*, Congress may expel aliens for causes which have no rational relationship to their desirability as residents, and which may be wholly arbitrary, whimsical, or worse. These causes may long antedate the expulsion legislation. They may be reprisals for the exercise of First Amendment rights.[5] Congress may even require the expulsion of aliens who are or were members of a named organization, which is the same thing as expelling aliens by name.

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[4] See cases collected in fn. 10 of *Smith* v. *Allwright*, 321 U.S. 649, 665.

[5] This was the factual situation in *Galvan*. Yet the majority opinion makes no reference to the First Amendment.

These rules of unrestricted power established by *Galvan* are of tremendous consequence to the entire alien community, to all citizens who are bound to resident aliens by ties of blood, affection or financial interest, to the status of our nation as a free society, and to its good repute in the world community of nations. On its face the rules are, to say the least, of doubtful validity. *Galvan* recognized as much, saying (at 530-1):

> " . . . considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this Court has said in Ng Fung Ho v. White, 259 U.S. 276, 284, deprive a man 'of all that makes life worth living'; and, as it has said in Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 'deportation is a drastic measure and at times the equivalent of banishment or exile.'
>
> "In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155, much could be said for the

> view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation."

Galvan, however, did not examine on principle the serious constitutional questions raised by the legislation. Although the Court had never before passed on the validity of a comparable statute,[6] the majority in *Galvan* considered the issues settled by a supposed course of prior decisions. As the opinion continued (at 531-2):

> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' New York Trust Co. v. Eisner, 256 U.S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of government. And whatever might have been said at an earlier date for applying the ex post facto Clause, it has

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[6] The closest legislation previously considered was that sustained in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, which Justice Murphy, concurring in *Bridges* v. *Wixon*, 326 U.S. 135, 157-166, had earlier considered unconstitutional. Though we believe that *Harisiades* was wrongfully decided, at least this much must be said for it, that unlike *Galvan* it did make some independent examination of the constitutional questions involved.

been the unbroken rule of this Court that it has no application to deportation.

"We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional powers in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. See Bugajewitz v. Adams, 228 U.S. 585, and Ng Fung Ho v. White, 259 U.S. 276, 280."

One questions that so much abnegation of the judicial function is ever warranted, it being "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV", especially "if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *Collected Legal Papers* (1952) p. 187, quoted in Douglas, *We, the Judges*, p. 430. Moreover, the surrender in *Galvan* rests on mistaken premises. It is correct that the slate was not clean, but the Court misread its markings. As we show in what follows, it is not true that prior decisions had established that policies pertaining to the right of aliens to remain here are so "exclusively entrusted" to Congress as to be immune to constitutional restrictions. There is no "unbroken rule" that the ex post facto clause has no application to deportation legislation. Nor did such civil libertarians as Justice Holmes, who wrote the opinion in *Bugajewitz*, or Justice Brandeis, who wrote the opinion in *Ng Fung Ho*, commit themselves to the views that Congress may arbitrarily choose victims for expulsion or may expel named aliens or groups. Justice

Holmes and Brandeis do not deserve the imputation that they would have sustained a statute expelling aliens, who were Jewish or Catholic or believed in Irish independence.

B. Galvan Misreads History

What the Court did in *Galvan*, as in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, was to rely on generalizations taken out of their historical and decisional context, meantime inexplicably ignoring contrary generalizations.[7] These generalizations—that the deportation power is unlimited and that deportation is not punishment—derive originally from decisions dealing with exclusion legislation or with expulsion legislation ancillary to exclusion. They were then repeated in connection with legislation which reasonably defined in terms of culpable characteristics classes of aliens who were undesirable residents at the time of expulsion. These decisions, dealing as they do with subjects not comparable to those involved in *Galvan*, do not support *Galvan*.

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[7] Thus in accepting the generalization that "deportation is not punishment," *Harisiades* and *Galvan* overlooked such statements as the following: "That deportation is a penalty—at times a most serious one—cannot be doubted." *Bridges* v. *Wixon*, 326 U. S. 135, 154. "Deportation can be the equivalent of banishment or exile." *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391. ". . . deportation is a drastic measure and at times the equivalent of banishment or exile . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Tan* v. *Phelan*, 333 U. S. 6, 10. "Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that,'. . . deportation is a drastic measure and at times the equivalent of banishment or exile. . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Jordan* v. *DeGeorge*, 341 U. S. 223, 231.

Leaving aside for the moment the unpopular and short-lived Alien Act of 1798 which was never applied, our early deportation laws were enacted solely in aid of exclusion laws and to prevent evasion of admission requirements. Konvitz, *The Alien and the Asiatic in American Law*, p. 47; Maslow, *Deportation Law: Proposals for Reform*, 56 Col. L. Rev. 309, 312. The first laws were directed against Chinese laborers, and provided both for their exclusion and for their expulsion if "found unlawfully within the United States." Maslow, *op. cit. supra, id.* The exclusion provision of the Act was upheld in *Chae Chan Ping* v. *United States*, 130 U. S. 581, decided in 1889, on the theory that Congress had full unreviewable power to *exclude* any aliens. In reviewing the Act, the Court described Chinese laborers as follows (at 595): " . . . they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seems impossible for them to assimilate with our people or to make any change in their habits or modes of living." The Court gave no consideration to the power of Congress to *expel* lawfully admitted resident aliens, and indeed commented (at 611) that the Alien Act of 1798, then the only legislation which had ever provided for the expulsion of resident aliens, was "entirely different from the Act before us."

The subsequent exclusion case of *United States ex rel Turner* v. *Williams*, 194 U. S. 279, decided in 1904, commented (at 292) that an alien seeking admission is not entitled to the protection of the Constitution which covers only those within the country. Cf. *Johnson* v. *Eisentrager*, 339 U. S. 763. The Court repeated the admonition made in *Chae Chan Ping*, *supra*, that

nothing in its decision should be taken as upholding the validity of the Alien Act of 1798 (at 294-5).

The first case to uphold an act of expulsion and the source of the generalization that "deportation is not punishment" is *Fong Yue Ting* v. *United States*, 149 U. S. 698, decided in 1893. The statute there involved had been enacted as an aid in enforcement of the statute excluding Chinese laborers which had been upheld in *Chae Chan Ping, supra*. It provided that all Chinese in the country who could not produce a certificate of residence would be deemed to be unlawfully within the country, and could accordingly be deported. It also provided that a Chinese resident in the country could obtain such a certificate only by establishing his lawful residence by "at least one credible white witness." The statute was sustained as a necessary auxiliary to the power to exclude and as resting upon the unreviewable power of Congress to exclude, as upheld in *Chae Chan Ping* v. *United States, supra*. The aliens in question were ordered deported because although they were able to prove their lawful admission by the testimony of Chinese witnesses, they could not produce "one credible white witness" as required by the statute.

The statute, of course, based as it was on blatant racism, was a barbarity.[8] *Fong Yue Ting* fits within the description of "a case that represents, historically and juridically, an episode of the dead past as unrelated to the world of today as the one-hoss shay is to the latest jet airplane." (Frankfurter, J., in *Kinsella*

[8] Justice Brewer, dissenting, commented at 744: "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciples of Confucius fairly ask, why do they send missionaries here?"

v. *Kruger*, 351 U. S. 470, 482). The holding in *Fong Yue Ting* could not be followed today, since even *Galvan* recognizes (at 531) that expulsion policies must be enforced within the confines of procedural due process. And see *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49. Moreover, *Fong Yue Ting* is irrelevant as well as obsolete. It involved a statute considered to apply to illegal entrants and thus to be ancillary to the exclusion process. The legislation did not, ostensibly at least, expel persons who had lawfully entered the United States for causes unconnected with their entry. Under the circumstances, it would be unfitting for the Court to rely upon the generalizations in *Fong Yue Ting* to the effect that the power to expel, like that to exclude, is an inherent right of sovereignty and lies in the area of political questions.

The cases which immediately followed *Fong Yue Ting* did not read it broadly, being careful to recognize that its theses applied only to legislation dealing with persons who had entered illegally. *Japanese Immigrant Case*, 189 U. S. 86, 97, 98, 100 (1903); *U. S. ex rel Turner* v. *Williams*, *supra*, at 289-290, *supra*, (1904); *Keller* v. *United States*, 213 U. S. 138, 143-4 (1909). Moreover, in *Turner*, the Court again expressed doubts (at 294-5) as to the validity of the Alien Act of 1798,[9] a view which would be untenable under the theory of *Galvan*.

Accordingly, as of 1909, this Court had considered the expulsion power only as applied to persons who had illegally entered or as an auxiliary to existing ex-

[9] These doubts existed as late as 1948. See *Ludecke* v. *Watkins*, 335 U. S. 160, 171, ftn. 18.

clusion legislation. It had not considered any case involving expulsion of a lawfully admitted domiciled alien for conduct engaged in after admission. Obviously, none of the cases so far reviewed, whatever language any may contain, furnishes valid support for *Galvan*.

The view has been taken that the power to expel can properly be exercised only as an adjunct to enforcement of exclusionary laws. See Maslow, *op. cit.*, at 321-324; Corsi, *Paths to the New World: American Immigration—Yesterday Today and Tomorrow* (1953) 40. Cf. Boudin, *The Settler Within Our Gates*, 26 N.Y.U. L. Rev. 266, 451, 634 (1951). A persuasive case could be made to this effect under the Ninth and Tenth Amendments. However, beginning with 1912, this Court did sustain the expulsion of lawfully-admitted aliens. These cases are surprisingly few in number, none of them serves as a valid precedent for *Harisiades* and *Galvan*, and none can legitimately be taken to foreclose the issues involved in *Galvan*.

The first two of these cases, *Low Wah Suey* v. *Backus*, 225 U. S. 460 (1912) and *Zakonaite* v. *Wolf*, 226 U. S. 272 (1912), represent a transition from the exclusion cases. They sustained a statute requiring expulsion of any alien who practiced prostitution within three years after entry. Since the statute had been in effect at the time of the alien's entry, and in view of the short time limitation, the Court readily upheld it as imposing a condition subsequent on the entry and thus as an aid to exclusion policy.

The first full-fledged expulsion case was *Bugajewitz*

v. *Adams*, 228 U. S. 585 (1913),[10] cited in *Galvan*. That sustained the statute expelling prostitutes, as amended to remove any limitation of time on the commission of the offense after entry, but as applied in the particular case to an alien who was currently a prostitute. The opinion, written by Justice Holmes, stated (at 591):

> "It is thoroughly established that Congress has the power to order the deportation of aliens whose presence in the country it deems hurtful. . . . nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. . . . The prohibition of *ex post facto* laws in article 1, § 9, has no application. . . ., and with regard to the petitioner it is not necessary to construe the statute as having any retrospective effect."

Galvan was not justified in considering that the characteristically terse opinion in *Bugajewitz* releases expulsion legislation from the restrictions of substantive due process and under all circumstances from the *ex post facto* clause. The *Bugajewitz* statute estab-

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[10] *Tiaco* v. *Forbes*, 228 U. S. 549, decided a week before *Bugajewitz*, upheld the power of the Philippine government to expel certain Chinese aliens summarily at the request of the Chinese Government. The grounds for the expulsion, other than that it was at the request of the Chinese government, does not appear from the opinion. The case is as obsolete and ill-considered as *Fong Yue Ting*, on which it relied, and contains no analysis of the constitutional questions which were involved. It sanctioned a summary expulsion without any aspects of procedural due process in conflict with the doctrine of the earlier *Japanese Immigrant Case*, *supra*, which has been re-affirmed by this Court as recently as *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. Because of its peculiar facts, and the reliance of the Governor General of the Philippines on Spanish law, the case can have no significance for the problems posed here. It was regarded by the Senate in 1940 as having no possible application beyond its peculiar facts. See Sen. Rep. 931, 76th Cong. 3rd Sess., at p. 4.

lished a class of aliens who had demonstrated the undesirability of their continued presence by engaging in immoral and harmful conduct. The reasonableness of the classification was clear, except in so far as it could include persons who had abandoned the practice of prostitution long before the time of the expulsion proceeding. This questionable feature, however, was not to the fore in *Bugajewitz* because of the facts in the case.

Bugajewitz, therefore, merely sustained the power to expel aliens whose continued presence in the country was reasonably "deemed hurtful" on the basis of their own culpable conduct. This is a far cry from holding that there is no due process limitation on expulsion; or that Congress may expel aliens who have not been guilty of culpable conduct and who may not reasonably be classed as undesirables; or that Congress may expel aliens by name. Similarly, the expulsion upheld in *Bugajewitz* was not punishment because the alien was deprived of the residence privilege by reason of a demonstrated unfitness to enjoy the privilege. It does not follow that expulsion can never be punishment, or that it is not punishment if there is no reasonable basis for supposing the alien's unfitness. See *infra*, pp. 53-59. The statements in *Bugajewitz* that "the deportation" is not "a punishment" and that the *ex post facto* clause "has no application"[11] should not, by mechanical jurisprudence, be applied to all expulsion legislation whatever its nature.

[11] It is significant that the only authority cited by Justice Holmes for the non-applicability of the *ex post facto* clause merely held that the clause did not bar revocation of naturalization procured by fraud *Johannessen* v. *United States*, 225 U. S. 227. Moreover, read in its context, the opinion does not appear to say anything more than that the *ex post facto* clause does not apply to the case. It does not say that the clause has no application to any deportation.

The other case primarily relied on by *Galvan* is even less apposite. *Ng Fung Ho* v. *White*, 259 U. S. 276, did not deal with the expulsion of a lawful entrant. It merely approved a retrospective change in the procedure for deportation for a fraudulent entry, and in the opinion (at 280) approvingly cited the language from *Bugajewitz* that "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful."

Following *Bugajewitz* and prior to *Harisiades*, only three cases in this Court discussed the validity of legislation providing for the expulsion of legally admitted aliens.[12] *Mahler* v. *Eby*, 264 U.S. 32, sustained a statute expelling aliens who had been convicted even prior to the legislation of crimes involving national security and who were found to be currently undesirable residents.[13] The statute involved, like that in *Bugajewitz*, made a reasonable classification of persons who had demonstrated that they were undesirable residents at the time of the expulsion. It therefore did not violate due process or inflict punishment. Although the opinion contains broad phraseology borrowed from *Fong Yue Ting, supra*, the essential holding in the case is set out in the following passage at 39: "Con-

[12] The Court has in other cases upheld the deportation of legally admitted aliens. But its opinions in these cases did not discuss the validity of the legislation authorizing the deportation, but discussed only questions of evidence or procedure. See e.g., *United States ex rel Bilokumsky* v. *Tod*, 263 U. S. 149; *Tisi* v. *Tod*, 264 U. S. 131; *United States ex rel Claussen* v. *Day*, 279 U. S. 398. None of these statutes, moreover, involved the objectionable features present in the statute under review here and in *Galvan*.

[13] The Court reversed the deportation orders in question because of the failure of the Secretary of Labor to find that the aliens were currently undesirable residents.

gress, by the Act of 1920, was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society." The case cannot support the proposition that Congress may expel resident aliens whose conduct has not demonstrated that their continued presence would be deleterious to the country's welfare. The Court's statement (at 39) that the *ex post facto* clause applies only to "criminal laws" is obviously an overstatement, in view of the line of cases beginning with *Cummings* v. *Missouri*, 4 Wall 277, which hold that a deprivation of civil privileges may constitute punishment and may violate the *ex post facto* and bill of attainder clauses. See *infra*, pp. 54-55. Moreover, the subsequent passage in the opinion (at 39), that the *ex post facto* clause does not apply "to a deportation act *like this*" (emphasis supplied) should not be stretched to mean that it does not apply to any deportation statute. See *infra*, p. 58.

In *Bridges* v. *Wixon*, 326 U. S. 135, Justice Murphy, concurring, discussed the constitutionality of the statute later sustained in *Harisiades*, and expressed the view that the legislation was invalid. The case was decided on a non-constitutional ground.

Finally, *Jordan* v. *DeGeorge*, 341 U. S. 223, represents a recognition by the Court that expulsion legislation is subject to the restrictions of due process. The statute there provided for the expulsion of an alien sentenced more than once to imprisonment of one year or more for a crime involving moral turpitude. The

Court sustained the statute as not unconstitutionally vague, stating (at 231):

> "Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that '. . . deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.' Fong Haw Tan v. Phelan, 333 U. S. 6. We shall therefore, test this statute under the established criteria of the 'void for vagueness' doctrine."

Justice Jackson, in a dissent joined by Justices Black and Frankfurter, held that the statute was invalid because of the vagueness of the term moral turpitude. The dissenting opinion said (at 232):

> "Respondent, because he is an alien, and because he has been twice convicted of crimes the Court holds involve 'moral turpitude,' is punished with a life sentence of banishment in addition to the punishment which a citizen would suffer for the identical acts."

It added (at 243):

> "A resident alien is entitled to due process of law. We have said that deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If respondent were a citizen, his aggregate sentences of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence

of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty. . . ."

The Court's opinion in *Jordan* v. *DeGeorge* is inconsistent with, and the dissenting opinion is irreconcilable with, the views adopted by *Harisiades* and *Galvan* that the expulsion power is not restricted by due process and that expulsion can never be punishment.

The preceding review demonstrates that *Galvan* misread the Court's prior decisions. These decisions had established only that Congress has an unlimited power to exclude aliens, including the power to deport for illegal entry; that it may employ the expulsion power to implement exclusion policy or to remove resident aliens who have demonstrated by their conduct that their continued presence in the country would be harmful; and that such legislation is not punishment. Generalizations to the effect that the expulsion power is unlimited and that deportation is never punishment are not supported by the decisions and are contradicted by contrary generalizations.

Harisiades made new constitutional law in the expulsion field. It was the first case in this Court to sustain, or even to involve, expulsion for conduct after lawful admission, which was not culpable when it occurred, and which had happened many years before the enactment of the legislation. It was also the first case to hold valid legislation expelling aliens for organizational membership. *Harisiades*, for reasons which appear subsequently, was wrongfully decided. *Galvan* goes beyond *Harisiades*. It involves all the questionable features of *Harisiades* and in addition

sustains a statute expelling aliens for membership in a named organization. There is no basis in history for the assumption in *Galvan* that the issues there involved were foreclosed by prior decisions. And since the due process clause protects resident aliens, it restricts the exercise of the expulsion power, substantively as well as procedurally.

III. THE STATUTE, ON ITS FACE AND AS HERE APPLIED, VIOLATES DUE PROCESS.

A. The Statute Is Invalid as Special Legislation

Once the statute is examined on the basis of constitutional principle, there can be no doubt that it violates the due process clause. *Galvan* v. *Press* virtually recognized as much, pointing out that the legislation "strikes one with a sense of harsh incongruity" and questioning whether it is not among "enactments that shock the sense of fair play—which is the essence of due process" (at 530).

The most striking of the statute's features which violate due process is that it is special legislation. This act is the first and so far the only statute which expels aliens for membership in a specifically named organization, rather than by a descriptive classification of persons or organizations. On principle, the situation is the same as if Congress had listed the names of aliens to be deported. If Congress can make a valid determination that every past and present member of the Communist Party is an undesirable resident and must be expelled if an alien, it can validly make the same determination as to Charles Rowoldt by name or any other individual.

The statute's condemnation by legislative fiat is fundamentally repugnant to due process. If the con-

stitutional clause means anything, it means that guilt cannot be legislated and that individuals and organizations can not be condemned without a hearing. Congress itself recognized as much in a saner climate, when, despite its hostility to Harry Bridges, it refused to enact a bill providing for his deportation. Representative Hobbes, though favoring Bridges' deportation, opposed the bill because it "frankly transgresses one of the cardinal principles which our founding fathers would have died to preserve inviolate." 86 Cong. Rec. 8201. And the Senate shared the view of Attorney General Jackson that the bill was obnoxious and its enactment "would be an historical departure from an unbroken American practice and tradition." Sen. Rep. 2031, 76th Cong., 3d Sess., p. 9.

The government defends the statute on the ground that it is a reasonable legislative judgment, based on evidence considered by Congress, that the Communist Party is a pernicious organization. Due process, however, prohibits condemnation by legislative fiat even if there is reason to believe that the victim is getting what he deserves. The due process clause requires not simply that condemnation appear reasonable or deserved, but that it be made by a civilized and fair method.

If the case were otherwise, the due process clause would be an impotent safeguard. For the fact is that governmental persecution and repression are always supported by contemporaneous "evidence" of its reasonableness. The persecution of Jews was justified by "evidence," including supposedly scientific data, that they were a mentally depraved group, dedicated to the practice of ritual murder and subornation of the

state. The slaveholders had "evidence" that the Negro was an inferior being whose enslavement was for his own good, and similar "evidence" is still currently cited in support of legislation enforcing segregation and discrimination against the Negro people. Persecutions of Catholics, Protestants, Quakers, Mormons, Chinese, Socialists, and members of labor unions have always been supported by "evidence" justifying measures of retribution.

The moral is that it is not safe, nor civilized, nor due process to permit legislative determination of the guilt of named individuals or groups no matter how clear their guilt appears to be. This holds particularly true in the case of aliens, who lacking the franchise are unable to protect themselves by political action. If this statute is upheld, the alien is at the mercy of Congress without any protection from the due process clause. Whatever organization he joins or has ever joined may sometime in the future be singled out for repressive measures. He may be expelled for being a Jew, a Mormon, a Catholic, or a trade union member. Whatever the cause, we may be sure that the legislature will be acting on "evidence" which some lawyers will be able to describe as "reasonable."

B. The Statute Is Invalid as an Irrational Deprivation of Liberty

The statute discriminates against resident aliens who were ever members of the proscribed organizations and imposes on them the harsh and often cruel reprisal of expulsion. Due process requires that this deprivation of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object

sought to be obtained." *Nebbia* v. *New York*, 291 U.S. 502, 525.

The sole justification of the expulsion power is that it enables the state to remove from its territory undesirable alien residents. Even aside from its characteristic as fiat legislation, the statute violates due process because it is so capricious an exercise of the expulsion power as to shock the conscience, and because it imposes a cruel sanction for reasons having no rational relation to the expulsion function.

The statute expels an alien solely because of organizational membership. This imputation of guilt by association is an offensively irrational means of adjudging the alien an undesirable resident. The irrationality is magnified by the fact that the statute makes no accommodation for the nature of the alien's connection with the organization. He may have had no knowledge of the claimed evil nature of the organization; his activities in the organization may have been innocuous, commendable, or limited to the exercise of constitutional rights; his membership may have been for a brief period; it may have existed long before the expulsion and long before the legislation making it cause for expulsion and may have been as remote as 1919 when the Communist Party was formed; the alien may never have had Communist beliefs, or, if he did, may have long ago abandoned them.

Such a statute cannot be reconciled with the due process principle of *Wieman* v. *Updegraff*, 344 U.S. 183. *Wieman* held that individuals could not be barred from governmental employment by reason of organizational membership unaccompanied by knowledge on their part of the guilty nature of the organization.

Surely government control over its own employment policies is at least as broad as its expulsion power, and deprivation of governmental employment is much less severe a sanction than expulsion.

The present case fully illustrates the cruel irrationality of the statute. There is no rational basis for a judgment that the petitioner is an undesirable resident because about twenty years ago, in a different political climate and before enactment of the deportation statute, he belonged to the Communist Party for six months, having joined it to struggle by peaceable means for bread and shelter for the unemployed, and while in it having sold books in a public bookstore. Yet petitioner, at the age of 72, having lived in this country for over forty years, is being uprooted and sent to a country which has become strange to him.

Nor is petitioner's case atypical. As all informed persons are aware, whatever else it is or was, the Communist Party since its beginning has extensively engaged in legitimate political activity and has zealously promoted numerous reforms and the economic advancement of workers. Hundreds of thousands, citizens and aliens, have at one time or another joined or supported it, not to foment insurrection but in a search for the solution of economic problems and for the betterment of society.

We have filed as an appendix to this brief the results of a study of political expulsion cases. This survey documents the inhumanity and lack of legitimate purpose of the policy of expelling persons on the ground of past Communist Party membership. The survey shows, for example, that as many as 46% of the aliens were charged with membership which

lasted only for two years or less and 15% with membership of one year or less (Appendix, Table 18), and that in a large majority the Party membership had ended long before the expulsion proceeding (Table 17). In only 4 out of 307 political cases did the government press charges of personal belief or advocacy rather than mere organizational membership or affiliation (Table 16). 60% of the victims entered the United States while they were minors, almost a third having been under 15 years of age (Table 2). 94% of them have lived in this country for more than 20 years, as many as 60% of them for over 40 years (Table 3). Over 66% of them are more than 55 years old, and a quarter are over 65 years of age (Table 1). They work in varied lawful pursuits and live throughout the country (Tables 5, 7). They have married American citizens and have American children and grandchildren (Table 9). They and their children have aided the United States in war-time (Table 8). Like appellant, many of them have tried to become American citizens (Table 10). They have lost their ties to their native country, most of them having no close relatives abroad and many being unable to speak the language of the country of their origin (Table 11). The expulsion of these persons does not represent a reasonable judgment that their continued presence in the country is undesirable or dangerous.

The irrationality of the statute is further revealed by the fact that Congress has provided that aliens, like the petitioner, are eligible for citizenship if their membership in the Communist Party has ceased more than ten years ago, 8 U.S.C. sec. 1424(c), thus indicating a judgment that they are neither undesirable or dangerous. But this statute has been applied by the Service as a trap for aliens, since the application for

citizenship and the accompanying required disclosure of past affiliation results, as was the case here, in the institution of deportation proceedings. See *Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization (1953) 194.

The government's contention that Congress could reasonably believe that the Communist Party advocates doctrines of violence is besides the point. The government is deporting Rowoldt, not the Communist Party. It is not expelling insurrectionary doctrine, seditious advocacy, or whatever else it charges against the Communist Party. Instead, to the shame of America's reputation before the world, it is deporting a 72 year old man who has lived here for more than 40 years because long ago during the depression he showed concern for the unemployed.

Moreover, contrary to the government's contention, the legislation is irrational in its proscription of the organizations it names as well as in its condemnation of all who ever belonged to them. Even if Congress could make a reasonable determination that the Communist Party advocated doctrines of violence in the past and at the time of the legislation, it could not make a reasonable determination that it will always so advocate in the future. There is nothing more irrational than an assumption that institutions can not change. Yet the statute expels for membership in the Party or successor organizations which occurs after the legislation as well as before. Furthermore, there obviously was no basis for a reasonable judgment that at all times in the past the Party has advocated violent overthrow of the government. It is indisputable that during World War II the Communist Party, so

far from advocating overthrow of the government, zealously supported the government in its fight for survival.

Still other circumstances reveal that the legislation is not, as the government suggests, a considered reaction against promulgation of doctrines of force. The statute applies not only to the Communist Party, but also by name to the Communist Political Association. Yet the theory of the government in its conspiracy prosecutions of Communists under the Smith Act is that the Political Association advocated peaceable change and class collaboration and that a conspiracy of violent revolution had its inception with the dissolution of the Political Association in 1945 and the reconstitution of the Party. See, e.g., *Dennis* v. *United States*, 341 U.S. 494.

The justification for the statute offered by its sponsors was not that the proscribed organizations were so demonstrably dedicated to violence as to make proof of the circumstance an inconsequential detail. On the contrary, it was that "satisfactory proof of that position offers a formidable obstacle." S. Rep. 2230, 81st Cong., 2d Sess., p. 24.

Nor can the statute be justified by considerations of need. The legislation here involved did not supersede the provisions which expel aliens who ever belonged to any organization which advocates the violent overthrow of government or who themselves ever advocated such doctrine. The experience of the executive showed that this legislation adequately served the purpose of deporting aliens supposed to be undesirable by reason of past or present contact with revolutionary doctrine. On August 8, 1950, about a month before

enactment of the Internal Security Act, the President sent to Congress a message recommending the enactment of new legislation to protect the internal security. He expressly stated therein that existing laws "permit the Government to exclude or deport any alien from this country who may be dangerous to our internal security." H. Doc. 679, 81st Cong., 2d Sess., p. 4; 96 Cong. Rec. 12019. The President requested in his message that the immigration laws be amended to include reporting requirements for aliens ordered expelled but not yet deported (H. Doc. 679, p. 5; 96 Cong. Rec. 12020), but he saw no necessity for requesting an increase in the classes of deportable aliens. Later, the President vetoed the Internal Security Bill.

C. The Due Process Defects Can Not be Disregarded Because of Reasons Special to the Power of Alien Expulsion

Many, but not all, of the due process defects of the statute exist in the act sustained by *Harisiades* v. *Shaughnessy, supra.*[14] That case, recognizing that the legislation there involved "stands out as an extreme application of the expulsion power" (at 588) and "inflicts severe and undoubted hardship on affected individuals" (at 590), nevertheless sustained the act against due process challenges similar in some respects to those advanced here. It did not, however, apply orthodox principles of substantive due process. In-

[14] Unlike the legislation here involved, the *Harisiades* statute does not proscribe organizations by name and applies only to aliens who were members of an organization at a time when it advocated illicit doctrine. Like the present statute, that in *Harisiades* attributes guilt by association, does not allow for the possibly innocent nature of the alien's connection with the organization, including a possible absence of scienter, and applies retroactively.

stead, it treated expulsion as a governmental function which for reasons special to it is immune from due process objections. The same view underlies *Galvan*.

Two premises for this view were stated in *Harisiades*: (1) The alien has no "vested right" to retain his residence because, by rejecting American naturalization, he "perpetuates a dual status as an American inhabitant but foreign citizen" and "to protract this ambiguous status within the country is not his right but a matter of permission and tolerance" (at 585, 586-7). (2) Whether the power of expulsion is unreasonably and harshly exercised is a matter "largely immune from judicial inquiry or interference" because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" (at 588-9).

Neither of these reasons is a valid defense to the due process objections which we have made. Due process prohibits an irrational and discriminatory deprivation of a privilege, as well as of a "vested right," as for example, in the case of the privilege of government employment. *Slochower* v. *Board of Higher Education*, 350 U.S. 551; *Wiemann* v. *Updegraff*, *supra*; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. And as *Galvan* pointed out (at 530), substantive due process is a limitation upon all powers of Congress, even the war power. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 155.

Moreover, any connection between the conduct of foreign relations and the expulsion of domiciled aliens is tenuous. The expulsion of such aliens does not in-

volve negotiations with foreign governments. Nor are those to be expelled defined in terms of their nationality. Those ordered expelled are citizens or subjects of other countries (or, in many instances, are stateless), but so are many defendants in criminal proceedings.

The common denominator of the two propositions advanced by *Harisiades* is that the alien is an unassimilated element who enjoys this country's hospitality without contributing anything in return and to whom, therefore, there is owed no obligation of fair dealing in the withdrawal of the hospitality. This view, however, was not shared by the Founders, who included aliens as well as citizens in the obligation of decent treatment expressed by the due process clause. They did so, it is fair to say, because they realized that America, a land settled by immigrants, still needed settlers from foreign countries to help build the country. *Harisiades,* ignoring this circumstance, gave a description of the alien which has no validity with respect to the vast majority of aliens in this country, who, like the petitioner, immigrated here for permanent residence and have made this country their home.

The immigrant is not a recipient of a gratuity and he does not remain a stranger. He came here at our invitation to help build the country, and he has contributed to our society and become part of it. The immigrants gave their children to populate our land. They brought us their cultures, their skills, and their ideals. They developed our fields, mines and factories.

These immigrant aliens do not fall within the description given in 1889 to Chinese laborers as people who "retained the habits and customs of their own country" and constituted a foreign "settlement within the State, without any interest in our country or its institutions." *Chae Chan Ping* v. *United States*, *supra*, at 596. These aliens' ties to their countries of origin are remote. Their mature years and energies have been expended here. They have married American citizens and begat American citizens. Whatever the international technicalities, sociologically they are a product of America and alien to the country of their birth. *Whom We Shall Welcome*, *supra*, 193-4, 200-2, 225-6; *Corsi*, op. cit.; *Maslow*, op. cit. p. 323-324; Chafee, *Free Speech in the United States* (1948) 238, 240. See e.g., *United States ex rel. Klonis* v. *Davis*, 13 F. 2d 630 at 630: "Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any borne of ancestors who immigrated in the seventeenth century." As our Appendix shows, these circumstances are true of the aliens ordered deported on political grounds (Tables 1, 2, 3, 4, 9, 11).

To regard the expulsion of such immigrant aliens as an aspect of international relations, or to assume, as did *Harisiades* (at 585), that the countries of origin might protest against their deportation on the ground that this was mistreatment of their citizens, is unrealistic. Indeed, the difficulty is to persuade foreign countries to accept those we expel. See *Annual Report of Attorney General*, 1955, p. 408. As a Polish consul was

reported to have said before the war in explanation of Poland's refusal to admit a deportee of Polish origin: "A two-year old baby was sent to your country. You desire to send back in his place a fifty-two-year old criminal." Davie, *World Immigration* (1949) 412.

Harisiades manifests an attitude that the mistreated alien has only himself to blame because of a calculated refusal to accept naturalization (at 586-7). This is no basis for withholding from the alien the due process protection which the Constitution affords him. Moreover, the assumption is unsound. The fact is that, as in this case, many aliens have been prevented from obtaining citizenship by restrictive naturalization laws and, even more, by a restrictive administration of those laws. Still others erroneously believe that they are citizens. See Appendix, Table 10.

There is, therefore, no valid basis for depriving the alien of the protection of the due process clause, which was drawn to apply to alien and citizen alike. The alien, like the citizen, is entitled to decent treatment because he makes a contribution to our society and because he is a part of it. There is only one due process clause. The alien is concededly entitled to procedural due process. He is likewise entitled to substantive due process. And the principles of both kinds of due process are the same for both the citizen and the alien. Those principles condemn the legislation here.

IV. THE STATUTE IS A BILL OF ATTAINDER AND AN EX POST FACTO LAW

A. An Expulsion Statute Inflicts Punishment if It Is Not Based on Reasonable General Standards of Undesirability for Residence

"A bill of attainder is a legislative act which inflicts punishment without judicial trial." *Cummings* v. *Missouri, supra,* at 323. ". . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States* v. *Lovett,* 328 U.S. 303, 315; *Garner* v. *Board of Public Works,* 341 U.S. 716, 722. "An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed." *Burgess* v. *Salmon,* 7 Otto 381, 384.

These definitions are met by the statute here involved if it inflicts punishment. As we have seen, *Galvan* and *Harisiades* stated that "deportation is not punishment." In this respect, they relied on previous statements to that effect by the Court, while ignoring statements to the contrary. See *supra,* p. 29, ftn. 7.

It is, however, not appropriate to inquire in the abstract and conceptualistically whether expulsion is punishment. The appropriate question is whether the particular expulsion provision inflicts punishment. The answer is that some do and others do not, depend-

ing on criteria which though elsewhere applied by the Court were ignored by *Galvan* and *Harisiades*.

In their uncritical reliance upon the formula that "deportation is not punishment", *Galvan* and *Harisiades* marked a sharp departure from the practice of this Court not to accept uncritically generalizations from earlier decisions without regard to the holdings of the Court. "Still less should this Court's interpretation of the Constitution be reduced to the status of mathematical formulas. It is the considerations that gave birth to the phrase, 'clear and present danger', not the phrase itself that are vital in our decision of questions involving liberties protected by the First Amendment." *American Communications Association* v. *Douds*, 339 U.S. 382, 394. "And it was Mr. Justice Holmes who admonished us that 'To rest upon a formula is a slumber, that, prolonged, means death' Collected Legal Papers, 306. Such a formula makes for mechanical jurisprudence." Frankfurter, J., concurring in *Kovacs* v. *Cooper*, 336 U.S. 77, 96.

The correct approach was stated in *Garner* v. *Board of Public Works*, 341 U.S. 716, 722: "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.'" The proper inquiry, therefore, is whether the circumstances attending the particular expulsion statute here involved and the causes of the deprivation of the residence privilege under this statute constitute punishment.

As the quotation from *Garner* indicates, punishment is not necessarily a consequence of a criminal prose-

cution. It may consist of the civil deprivation of privileges. Thus punishment has been imposed by legislative acts which permitted the seizure of property (*Fletcher* v. *Peck*, 6 Cranch 87); excluded certain persons from various professions or employment (*Cummings* v. *Missouri*, 4 Wall. 277; *Ex Parte Garland*, 4 Wall. 333; *United States* v. *Lovett*, 328 U.S. 303; cf. *Garner* v. *Board of Public Works of Los Angeles*, *supra*); denied access to the courts (*Pierce* v. *Carskadon*, 16 Wall. 234); or exacted a tax (*Burgess* v. *Salmon*, *supra*).

Of course, these decisions do not mean that all acts seizing property, excluding persons from professions or employment, denying access to the courts, or exacting taxes are punishment. The Court did not find it necessary to overrule or limit *Cummings* v. *Missouri*, in holding that certain statutes that denied access to the professions were not punishment. *Hawker* v. *New York*, 170 U.S. 189; *Dent* v. *West Virginia*, 129 U.S. 114. On the contrary, it came to its result on the basis of an analysis of the particular statute there involved, a process which was neglected in *Galvan*. Similarly, although incarceration is normally considered to be punishment, it may not be if the statute provides for incarceration of the insane, persons with communicable diseases, or narcotic addicts. Cf. *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29; *Buck* v. *Bell*, 274 U.S. 200.

It is clear, therefore, that the test of punishment is not the quality of the privilege which is being removed nor the severity of the consequences. The determinative factor is the nature of the depriving legislation. The criterion was indicated in *Garner* v. *Board of Public Works*, *supra*, at 722, which stated:

"We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment." Deprivation of a privilege is not a punishment only if it is based on general standards which establish reasonable tests of fitness to enjoy the privilege.

The test in operation is shown by *Dent* v. *West Virginia, supra,* which held that a legislature could exclude a physician from his profession by raising the educational requirements for medical practitioners. *Hawker* v. *New York, supra,* held that a legislature could exclude from medical practice physicians who had theretofore been convicted of felonies. In both cases, the Court held that the statutes did not inflict punishment, but instead merely established qualifications for the medical profession which were reasonably related to the proper practice of the profession. The Court distinguished *Cummings* v. *Missouri* and *Ex Parte Garland* on the grounds that the test oaths in those cases exacted requirements which had no reasonable relation to the proper practice of the profession involved.

In *Dent* v. *West Virginia,* the Court explained *Cummings* and *Garland* as follows (at 126):

> "As many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that there was no way of inflicting punishment except by depriving the parties of their offices and trusts."

The Court also remarked (at 128) that the oath in *Cummings* v. *Missouri* was "the exaction of an oath as to their past conduct, respecting matters which have no connection with such professions" as contrasted to the law being examined which "was intended to secure . . . skill and learning in the profession of medicine."

In the *Hawker* case, the Court made the same analysis. It stated (at 198) of *Cummings* and *Garland*;

> "It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counselor, the oaths should be considered, not legitimate tests of qualifications, but in the nature of penalties for past offenses."

The Court had no trouble in deciding that this situation did not apply to legislation which resulted in barring from practice a physician who had been convicted of committing an abortion prior to the enactment of the legislation. Such a statute, the Court stated (at 199) was not an imposition of an additional penalty, but the prescribing of reasonable qualifications for those practicing the profession.

The distinction made by these cases between punishment and the establishment of standards of qualification is that in the latter situation the standards bear a reasonable relationship to insuring that the privilege is not misused. This test is readily applied to situations involving the privilege of aliens to continue to reside in this country. A deprivation of the residence privilege is not punishment if it represents the establishment of standards reasonably relevant to

ridding the country of undesirable aliens. But it is punishment to deprive a resident alien of his residence privilege if the deprivation is not based on any standards at all or on standards which have no reasonable relationship to undesirability.

Nothing more than this is meant by the decision in *Mahler* v. *Eby, supra,* which held that it was not punishment to expel an alien who, before enactment of the particular deportation statute, had been convicted of a felony against the security of the state. Such an expulsion statute was considered an establishment of reasonable qualifications for the privilege within the doctrine of *Hawker* v. *New York*, and in fact the Court in *Mahler* relied on *Hawker*. The Court stated in *Mahler* (at 39) that by the statute Congress

> "was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their careers that their continued presence here would not make for the safety or welfare of society."

Mahler does not mean that the Court would have sustained any deportation statute as valid, even if the statute had no rational relationship to alien undesirability, any more than *Hawker* stands for the proposition that a state could revoke the license of a medical practitioner on any ground, including grounds that had no rational relationship to the practice of medicine.

Similarly when *Bugajewitz* v. *Adams, supra,* sustained the deportation of an alien prostitute on the ground that "deportation was not punishment", it was not laying down a maxim for all deportation statutes in the future; it was holding no more than

that the particular deportation was a reasonable exercise of Congressional power "to order the deportation of aliens whose presence in the country it deems harmful" (at 591). See *supra*, pp. 33-35.

If, contrary to our argument, the test of punishment were the nature of the privilege being removed, then indeed nothing could be more anomalous than the generalization that "deportation is not punishment." The residence privilege is certainly more important to the individual than the ability to practice a particular profession in a particular state. One who permanently loses the residence privilege is deprived of liberty far more than one who is imprisoned for a short period. And although "Exclusion of a newly arrived alien by administrative fiat is not a serious hardship, for he simply returns to his old life and takes up the threads where he recently dropped them, . . . exclusion after long residence is another affair. Liberty itself, long-established associations, the home, are then at stake." Chafee, *Free Speech in the United States*, *supra*, at 199. "To aliens who have lived in the United States for many years, who have become integrated into its community life, and whose ties to their mother country have become remote and purely technical, a deportation order becomes the most severe and cruel penalty imaginable", *Whom Shall We Welcome*, *supra*, 193-194.

Moreover, the deportation procedure involves loss of liberty in respects other than the expulsion itself. The alien may be held in detention without bail during the deportation proceeding and for a six months period after the deportation order becomes final. See sec. 242(a)(c), Immigration and Nationality Act, 8 U. S. C. sec. 1252(a)(c); *Carlson* v. *Landon*, 342 U.S.

524; *United States* v. *Shaughnessy*, 117 F. Supp. 699. The detention frequently is in a common jail. See *United States* v. *Shaughnessy*, 112 F. Supp. 143. If deportation is ordered but cannot be accomplished, the alien may be subjected during the rest of his lifetime to onerous restrictions on his freedom, including limitations on those with whom he may associate, requirements on reporting to the Immigration and Naturalization Service, subjection to interrogation by the Service, restrictions on his right to travel or move his residence, as, for example, a prohibition that a New York resident not travel more than fifty miles from Times Square without written permission of the Service. Sec. 242(d) Immigration and Nationality Act, 8 U.S.C. sec. 1252(d); see *Nukk* v. *Shaughnessy*, 125 F. Supp. 498, 499, 509, ftns. 2 and 3; *Yanish* v. *Barber*, 97 L. Ed. 1637. If the alien does not make reasonable efforts to deport himself, he may be imprisoned for ten years. Sec. 242(e) Immigration and Nationality Act, 8 U.S.C. sec. 1252(e); *United States* v. *Spector*, 343 U.S. 169. He may now be deported to any country that will accept him, even if he was never previously connected with it. Sec. 243(a)(7), Immigration and Nationality Act, 8 U.S.C. sec. 1253(a)(7). It is perhaps needless to say that these various sanctions have been applied harshly to aliens ordered deported on political grounds. See Appendix, Tables 14, 15; *Yanish* v. *Barber, supra.*

The approach that deportation is not per se punishment has, therefore, become more and more difficult, as was recognized by Mr. Justice Jackson dissenting in *United States* v. *Spector, supra,* at 178:

> "Administrative determinations of liability to deportation have been maintained as constitutional only by considering them to be exclusively civil in

nature, with no criminal consequences or connotations. That doctrine early adopted against sharp dissent has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry, but on conduct after admittance, have been added, and the period within which deportation proceedings may be instituted has been extended. By this Act a deportation order is made to carry potential criminal consequences."

Finally, the generalization that deportation is not punishment is an anachronism when applied to oust application of the bill of attainder clause. One of the familiar penalties imposed by Parliamentary bills of pains and penalties was banishment from the realm. So Parliament decreed the banishment of the Earl of Clarendon in 1667 (19 Car. II, c. 10) and of the Bishop of Rochester in 1722 (9 Geo. I, c. 17); see 46 Col. L. Rev. 849, 851. Indeed, the first known instances of the use of the bill of pains and penalties was the banishment of the two Spensers in 1322. 46 Col. L. Rev. 849, at 850, fn. 7.

Precedent and the realities combine, therefore, to require the abandonment of the conceptualistic and ritualistic formula that deportation is not punishment, and to substitute for it the correct approach that whether or not an expulsion statute inflicts punishment depends on whether it establishes general standards defining classes of persons whose continued residence in this country may reasonably be considered harmful.

B. The Deportation Provision Here Involved Inflicts Punishment Because It Does Not Establish Standards of Undesirability and Has No Reasonable Relevance to Expulsion of Undesirable Aliens

Under the test which we have described, the statute here involved is clearly punishment. For the statute establishes no standards at all of alien undesirability, a process which would necessarily involve a statement of culpable characteristics. All the statute does is to expel members of a named organization. This is not an establishment of standards or qualifications. It is merely an identification of the persons to be expelled. The situation is precisely as if Congress had listed certain aliens by name and provided that they should be deported. The situation is the same as the statute in the *Lovett* case, *supra;* which the Court later explained was penal because it "did not declare general and prospectively operative standards of qualification and eligibility for public employment." *Garner* v. *Board of Public Works of Los Angeles, supra,* at 723. Furthermore, as our due process discussion has demonstrated, the statutory cause for expulsion—mere membership no matter how remote or innocent—is not reasonably connected to the objective of removing aliens whose continued residence is injurious to our society.

Since the expulsion statute here involved does inflict punishment, it is invalid as a bill of attainder and an *ex post facto* law. With respect to the latter feature, there is not present here the complication in *Harisiades* which pointed out that since 1920 Congress had maintained a standing admonition to aliens not to join organizations that advocate violent revolution (at 593). Cf. *Garner* v. *Board of Public Works of Los Angeles, supra.* Not until 1950, by this statute did

Congress admonish aliens not to join the Communist Party, and Congress did not earlier make a legislative finding that the Communist Party advocated violence. Indeed, when the issue of the nature of the Party's advocacy came before this Court in 1943 in *Schneiderman v. United States,* 320 U. S. 118, seven years after the cessation of the petitioner's membership, this Court held that the question was an open one.[15]

V. The Statute Violates the First Amendment

The Court's opinion in *Galvan* v. *Press* did not consider the validity of the statute under the First Amendment. We submit that the statute also violates that provision of the Constitution, because it is a reprisal for the exercise of protected rights of assembly and expression.

In *Harisiades,* the Court held that the First Amendment did not protect an alien against expulsion for past membership in an organization which advocated the violent overthrow of the government. The Court based this holding on the pernicious nature of the ad-

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[15] The Court said at 148: "With commendable candor, the government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle, and it also concedes that 'some Communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal' ". See also Chafee, *Free Speech in the United States, supra,* at 481: "[The] question [of the nature of the Party advocacy] has puzzled men of high intelligence since the Deportation Act of 1918. United States Circuit Court Judges and Cabinet officers could not agree about it in 1920. We have had two decades since then in which to make up our minds, and the problem is still unsolved." See also for similar expressions *Strecker* v. *Kessler,* 95 F. 2d 976 (C.C.A. 5, 1938), *Kessler* v. *Strecker,* 307 U. S. 22; Note, 52 Yale L. J. 108, 128.

vocacy involved and on an asserted right of Congress to distinguish between the advocacy of peaceable change and the teaching of violence (at 592).

The statute here makes no such distinction. It simply proscribes for an alien an identified political affiliation, whether or not the group advocated violence. The statute in *Harisiades* required the government to prove that the organization advocated violence at the time of the alien's membership. The cases in *Harisiades* came to the Court with an unchallenged finding that the Party during the period of the alien's membership taught and advocated overthrow of the Government of the United States by force and violence (at 584). Under the statute here, no such finding is required, and evidence on the subject is irrelevant. This statute expels aliens for being members of an organization which did not during their period of membership advocate illicit doctrine. It expels the petitioner and other aliens solely because they engaged in peaceable assembly, expression and political activity.

Harisiades sustained an extensive and unjustifiable interference with aliens' rights of speech and association, since it sustained deportation not for anything the alien himself did or said, but solely because of the guilty advocacy of the organizations even if unknown to the alien. In this respect, *Harisiades* is inconsistent with *DeJonge* v. *Oregon*, 299 U. S. 353; *Garner* v. *Board of Public Works of Los Angeles*, *supra*, at 723-4; and *Wieman* v. *Updegraff*, 344 U. S. 183. Furthermore, *Harisiades* wrongly disregarded the clear and present danger test. *American Communications Association* v. *Douds*, *supra*; *Dennis* v. *United States*, *supra*. *Harisiades* itself, therefore is an extreme case.

The statute here is an even greater invasion of the First Amendment than the provision sustained in *Harisiades*, and it cannot be justified even under that decision.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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